No. 2828

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACIFIC FISHERIES, a Corporation, its Officers, Agents, Employes, and all persons acting by, through or under or in privity with it, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

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Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

SHANNON-CONMY, 809 SANSOME ST.

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STATEMENT

The record herein shows that on the 3rd of March, 1891, the Annette Islands, situated in Alexander Archipelago, Southeastern Alaska, were set aside by an Act of Congress of the United States as a reserve for the use of the Metlakahtla Indians and such other natives of Alaska as might join them thereon. These Indians had located on these islands a couple of years previously, having emigrated from British Columbia. These islands consisted of one main island, called Annette Island, and several smaller islands, and they and the surrounding waters are a part of the public domain of the United States.

See 26 Stats. p. 1101.

Ever since the date of the Act aforesaid the Department of the Interior of the United States has had supervision over the reserve thus created and over the inhabitants thereof, and Congress has appropriated money from time to time for the purpose of improving the condition of these people. The work of educating them and training them in industrial pursuits was left for many years mainly in charge of one William Duncan, a former lay missionary of the Church of England; and under his guidance considerable advancement had been made by them, all of the Indians acquiring more or less proficiency in the rudimental branches of learning and considerable proficiency in the use of tools and in industrial pursuits generally. These people have built upon the main island a town called Metlakahtla, have built and maintained a school, built and maintained a water system, built and maintained a fish cannery and a saw mill, and they have built and supported one of the largest churches in Alaska. They have advanced from a state of savagery to one of considerable civilization. They have to a certain extent, under a system approved by the Secretary of the Interior, governed themselves, and by ordinances of their council they have provided for health and fire protection and for the general welfare of the community.

About a half dozen years prior to the commencement of this action the younger and more progressive members of the community began to insist upon better educational facilities than could be

had under the management of said Duncan and the Interior Department caused a government school to be erected on the main island at the village of Metlakahtla and furnished therefor a government teacher. This move caused some friction between the Government and nearly all of the Indians on the one side, and said Duncan and a few of the older Indians on the other side, which continued until the Department of the Interior decided to assume exclusive control of all the material interests of the Indians living on the reserve, leaving only the supervision of spiritual affairs in the charge of said Duncan. With a view to assisting the Metlakahtlans to self-support and to resume the operation of the cannery (which on account of the friction before mentioned had been closed for several years), the Interior Department effected an arrangement with one P. E. Harris to manage the operation of the cannery, said Harris being a competent cannery manager who operated a cannery of his own elsewhere, to the end that in due course of time the operatives of said cannery would become fully trained in all branches of the fish-canning business, so that they would be competent to conduct this line of industry themselves. This arrangement was made in March or April of 1916.

Ever since the passage of the Act of Congress setting aside the reserve—a period of upwards of twenty-five years—no attempts had been made by anybody to encroach upon the use by the said Indians of these islands which comprise the reserve or the waters adjacent thereto.

That in furtherance of the design of the Government to have the cannery in question operated and to procure the necessary fish therefor and to prevent any further possible interference or intrusion by others in the waters surrounding this reserve, the President of the United States on the 28th day of April, 1916, issued his proclamation, proclaiming that the waters within three thousand feet from the shore at mean low tide of the said islands were thereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined or may join them in residence on these islands, and expressly warning all unauthorized persons not to fish in or use any of the waters therein mentioned.

That the appellant through its president, Charles Burkhardt, knowing of the intended arrangement between the Government and said Harris, began a correspondence with the Secretary of the Interior in the month of March, 1916, in regard thereto for the purpose of ascertaining what was being done in the premises, and was advised that no fishing rights would be granted anybody in these waters.

On the 4th of May, 1916, said Burkhardt received a communication from the Secretary of the Interior, notifying him of the proclamation of the President above mentioned, and the superintendent of the appellant, Mr. T. A. Heckman, some time after the first of April, 1916, in a conversation with said Harris told Harris that he, Heckman, knew about the arrangement made by the Government with him, Harris, and that said proclamation was about to be

issued, but that he, Heckman, had orders nevertheless from the appellant to construct a fish trap within the waters in question, and asked Harris what he intended to do about it. That appellant's acts in intruding upon the reserve and constructing said trap were without permission of any kind.

That the appellant, acting through its superintendent, T. A. Heckman, had by about the 19th of April, 1916, gotten the piling for the fish trap mentioned above driven in the waters of the reservation and completed the trap by capping the same and placing the webbing thereon some time after the issuance of the proclamation, to-wit, about the 21st or 22nd of May, 1916.

That after said arrangement was made with Mr. Harris for the operation of the cannery and after the commencement of the correspondence between the president of the appellant and the Secretary of the Interior, the cannery then upon the reserve was destroyed by an incendiary fire. That arrangements were at once entered into for the building of another cannery on the reserve.

That this suit was commenced on the first of June, 1916, and after the process had been served the appellant intruded upon the reserve and attempted to procure some of the natives to execute an affidavit to the effect that they, the inhabitants of the reservation, would be in no way injured by permitting the appellant to intrude upon the reser-

vation and to operate said trap, this having a tendency to reagitate the friction between the Government and a majority of the natives on the one side, and Duncan and a few of the older natives on the other side, which had been in progress for half a dozen years and which had after long and patient effort on the part of the Government been quieted.

The appellee in this suit prayed for an injunction requiring the removal of said trap from the waters of the reserve and enjoining appellant from trespassing on said land and waters mentioned and from fishing in said waters. The suit was prosecuted to final decree and the prayer of the appellee was granted, from which decree the appellant appeals.

ARGUMENT

The contention of the appellant is that in passing the Act creating the reserve Congress did not reserve any of the waters surrounding the islands beyond the line of mean low tide, and also that the proclamation of the President is without authority.

It is not necessary to cite authorities on the proposition that a statute must be construed with reference to the object intended to be accomplished by it; and that the meaning and application of the law may be ascertained by resort to the intention of the Legislature; that it should have a rational and sensible construction; that the spirit and reason of the law will prevail; and that in order to ascertain these objects it is proper to consider the occasion and necessity.

Shulthis vs. *MacDougal,* 162 Fed. 331 (affirmed in 170 Fed. 529);

Cardinal vs. *Smith,* 5 Fed. Cas. 2395;

Holy Trinity Church vs. *United States,* 143 U. S. 457;

Williamson vs. *Leland,* 2 Pet. 627;

Interstate Drainage Co. vs. *Freeborn Co.,* 158 Fed. 270;

United States vs. *Musgrave,* 160 Fed. 700;

United States vs. *99 Diamonds,* 139 Fed. 961.

It is presumed also that Congress acted with full information in regard to the subject matter.

State vs. *Higgins,* 121 Ia. 19, 95 N. W. 244;

State vs. *Hardin,* 62 W. V. 313, 58 S. E. 715.

Congress must be held to know what is a matter of common knowledge and what everybody else knew at the time of the passage of the Act creating the reserve, March 3, 1891, that these Indians are not tillers of the soil; that they do not procure food from tilling the soil; that they live by hunting and fishing. Congress must also be held to have known what everybody else then knew, that there was little or no agricultural land on these islands or in fact in all Southeastern Alaska, and that these Indians could not survive without the products of the sea for food. Congress must also have known that even the hunting on the islands so small in area as these

would be exterminated within a very short period of time and that the only means of subsistence would be from fishing. Therefore, Congress must be held to have made this reservation for the use of these Indians "to be held and used by them" for the purpose and in the manner that Indians ordinarily hold and use lands, namely, for the purposes of habitation and procuring food, by hunting and fishing, and must have intended to reserve for the use of the Indians the food supplies obtained from hunting and fishing incident to the islands; and this must be necessarily included within the scope and meaning of the Act.

Furthermore, the construction placed upon the statute by the officers whose duty it is to execute it, is entitled to great consideration.

> *United States* vs. *Cerecedo Hermanos y Co.*, 209 U. S. 337.

In addition to the above, this is the construction that has been placed upon the Act by everyone, for ever since the passage of the Act making this reserve, a period of upwards of twenty-five years, no attempt has ever made by anybody to encroach upon the use by the Indians of these islands or of the waters adjacent thereto.

The Act creating the reserve states that the islands are to be used by the Indians "under such rules and regulations and subject to such restrictions as may be prescribed from time to time by the Sec-

retary of the Interior." After the passage of the Act the Secretary of the Interior made certain rules, regulations and restrictions as he was authorized to do and they became by the terms of the Act a part of the Act, and these rules, regulations and restrictions became and were binding upon all persons whatsoever and not on the Indians alone. These rules, regulations and restrictions were promulgated by the Secretary in order that the design of Congress may be effected according to its true intent and purpose and, as stated, became a part of the Act itself, and are to be enforced as part of the Act by the executive authority.

All executive power of the Government is vested by the Constitution in the President.

Constitution, Art. II.

Section 465 of the Revised Statutes of the United States provides that "the President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any Act relating to Indian affairs."

Fed. Stat. Ann. 339.

The act of the President, therefore, in issuing the proclamation in question here is an act of executive authority fully warranted by the law and is a reasonable exercise of executive power.

In addition to what is stated above, the Act of Congress set aside "the body of lands known as

Annette Islands." It will be noted that the language of the Act is "lands" and "islands", thus indicating a group of islands situated in the Archipelago. It would be idle to say, and no one could seriously contend, that there was no reservation of the waters connecting and surrounding these islands. These islands and these waters being of the public domain of the United States, Congress had a perfect right to do with them as it saw fit, having inherited all the prerogatives and powers of the British Government and its Parliament, and has the right to make reservations of land in the public domain, and has the right to grant exclusive rights of fisheries, and even to close navigable waters.

2 Farnham on Waters, Sec. 370, p. 1373;
Gould on Waters, 3rd Ed., Sec. 189.

As representatives of the people, Congress has the Constitutional power to dispose of and to make all needful rules and regulations respecting the territory and other property belonging to the United States.

Constitution, Art. IV, Sec. 3.

The Congress having made the reserve by the Act of March 3, 1891, the President of the United States may modify the reservation by reducing or enlarging it.

Grisar vs. *McDowell,* 6 Wall. 363.

And in case Congress had not already done so, the President had power, if he saw fit, to enlarge the

reserve by including certain of the waters surrounding it, or to make the water boundaries definite, and the validity of his act would not be affected by the fact, if it were a fact, that the description in the original Act was defective or indefinite.

Grisar vs. *McDowell,* 6 Wall. 363.

Power of President to Create Reserve.

A reservation of the public lands may be made by Congress, or by the treaty-making power, or by order of the President.

From an early period it has been the practice of the President to order from time to time, as the exigencies of the public service require, parcels of land belonging to the Unitetd States to be reserved from sale and set apart for public uses.

Grisar vs. *McDowell,* 6 Wall. 381.

"An Indian reservation is part of the public domain set apart by the proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an Act of Congress, by a treaty, or by an executive order."

Wolcott vs. *Des Moines,* 5 Wall. 681.
Grisar vs. *McDowell,* 6 Wall. 363.
United States vs. *Payne,* 8 Fed. 883.

The authority of the President in this respect is recognized by numerous Acts of Congress.

Grisar vs. *McDowell,* 6 Wall. 363.

And by the decisions of the Courts.

Onderdock vs. *San Francisco,* 75 Calif. 534;
Florida T. I. Co. vs. *Bigalsky,* 44 Fla. 771;
Nevada Ditch Co. vs. *Bennett,* 30 Oreg. 59;
Apis vs. *United States,* 88 Fed. 931;
United States vs. *Payne,* 8 Fed. 833.

Congress has conferred upon the President the power to make a reservation of public land for certain purposes.

Spaulding vs. *Chandler,* 160 U. S. 394.
United States vs. *Blendauer,* 128 Fed. 910.

The President may effect a reservation of public land by proclamation.

Russian Amer. Packing Co. vs. *U. S.,*
199 U. S. 570;
Holmes vs. *United States,* 118 Fed. 995;
C. Doll v. *Meador,* 16 Calif. 295;
Jones vs. *Callvert,* 73 Pac. 701.

Where the President issues a proclamation reserving certain lands and warns all persons to depart therefrom, any rights previously acquired by settlers are thereby terminated.

Russian Amer. Pkg. Co. vs. *U. S.,*
199 U. S. 570;

Section 2258 of the Revised Statutes provides that "lands included in any reservation by any treaty,

law or proclamation of the President for any purpose" are expressly declared not to be subject to the rights of pre-emption.

Congress recognized the right of the President to make reservations of public lands by Act of September 4, 1841, entitled "An Act to appropriate the proceeds of sales of public lands and to grant pre-emption rights." (9 Stats. 77.)

Woolsey vs. *Chapman,* 101 U. S. 769.

By an Act of Congress of the year 1830, all lands were exempted from pre-emption which were reserved by order of the President.

By an Act of Congress of June 19, 1834, Congress revived the Act of May 29, 1830, which Act provided "No entry or sale of lands shall be made under the provisions of the Act which shall have been reserved for the use of the United States or either of the several States or which is reserved from sale by Act of Congress or by order of the President or which may have been appropriated for any purpose whatsoever.

Wilcox vs. *Jackson,* 13 Pet. 498.

In the case of Woolsey vs. Chapman, 101 U. S. at page 769, construing the Act of May 15, 1856, in aid of the construction of railroads (11 Stats. 9), this language was used:

> "Provided further, that any and all lands heretofore reserved to the United States by any Act of Congress or in any other manner by

> competent authority for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever, be and the same are hereby reserved to the United States."

The lands referred to above were withdrawn from private entry notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such withdrawal.

In *Wolcott* vs. *Des Moines,* 6 Wall. 681, the Court recognized the right of the President, of the Secretary of War, and of the Interior Department to reserve lands, *having competent authority so to do.*

See also

Wood vs. *Beach,* 156 U. S. 550.

The very extensive powers given to the President by Sections 462-465 of the Revised Statutes in the management of Indian affairs may well be held to include the power to establish a reservation if there were no other Act in relation to the matter.

United States vs. *Leathers,* 6 Sawy. 17;
Grisar vs. McDowell, 6 Wall. 363;
See 17th Opinions Atty. Gen'l, p. 258.

Speaking of the practice of the President to reserve public lands and set them apart for public use, it is said, in 17th Opinions of the Attorney General at page 258:

> "This practice doubtless sprung from the authority given by Congress to the President

> early in the history of this government to appropriate lands for purposes more or less general. As under the Act of May 3, 1798, in which the appropriation was made for the purpose of enabling the President to erect fortifications in such place or places as the public safety should in his opinion require. (1 Stats. 554.)"

The Attorney General further says:

> "A reservation from the public lands, therefore, for Indian occupation may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous Acts of Legislature recognized it as such. These statutes need not be particularly referred to; they are scattered throughout the statute books; indeed, the annual Indian bill is full of such recognitions."
>
> 17th Opinions Atty. Gen'l, p. 260.

Thus the President has always exercised this power and the power has been recognized by Congress and by the Judiciary, and it may be assumed as settled doctrine that the President of the United States has the authority and power to creat reservations of public domain by proclamation.

Reservation Included Public Waters.

By the Constitution of the United States (Art. II, Sec. 3), it is made the duty of the President to take care that the laws be faithfully executed, and in the case *in re* Neagle, 135 U. S. 64, the Court says: "Is this duty limited to the enforcement of the Acts of Congress according to their express

terms, or does it include all the protection implied by the nature of the Government under the Constitution?"

There can be no valid contention that the Act itself, interpreted according to the occasion of its creation and the intent and purpose of Congress in passing it, did not necessarily include the waters immediately adjacent to these islands. And what valid reason can be given for denying the President of the United States the right to reserve any of the public domain, be it land or water, for a public use? The word "lands" may be said to be inclusive of the word "waters." The Act of March 3, 1891, with reference to a reserve on the islands of Kodiak and Afognak, uses this language: . .

> "None of the provisions of the last two preceding sections shall be construed as to warrant the sale of any lands * * * which shall be selected by the United States Commissioner of Fisheries on the islands of Kodiak and Afognak for the purpose of establishing fish culture stations."

And yet on December 24, 1893, President Harrison, by his proclamation, set apart Afognak Island, Alaska, as a public reservation including the use for fish culture station, and its adjacent bays and rocks and territorial waters, including among others sea lion rocks and sea otter islands, and containing an express warning to all persons

> "not to enter upon or occupy the tract or tracts of land or waters reserved by this proclamation or to fish in or use any of the

> waters herein described or mentioned, and that all persons and corporations now occupying said islands or any of said premises, except under said treaty, shall depart therefrom. (27 Stats. 1052.)"

And referring to this proclamation, the Supreme Court of the United States, in the case of *Russian American Company* vs. *United States,* 199 U. S. 579, says:

> "As the President exercised the rights thus reserved and declared the whole island appropriated for the purpose of establishing a fish culture station and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement were terminated by the proclamation."

Thus a precedent is found for the construction of the executive power to make reservations from the public waters as well as the public lands of the United States, and reserving them to a particular public use, to the exclusion of all other uses and purposes. And this precedent has been in existence nearly a quarter of a century. It has been the construction placed upon the power of the President to make reservations by the officers having charge of the execution of the law for that period of time.

We can see no valid reason for denying the power of the President to reserve any part of the public domain, be it land or water, to an exclusive public use.

Section 254 of the Compiled Laws of Alaska,

which forbids aliens from fishing in Alaskan waters, except with rod, spear or gaff, does not present a serious obstacle to the validity of the President's proclamation.

The proclamation reserves the waters "for the benefit of the Metlakahtlans and such other Alaska natives as have joined them, or may join them in residence on these islands."

No one would contend that there are not many native-born Metlakahtlans after twenty-five years' residence on the islands, or that natives may not join them.

Summarizing the foregoing, we contend that the authorities support these propositions:

(a) That the Act of March 3, 1891, creating the reservation, by necessary intendment and construction included the waters surrounding these islands as a part of the reservation, and that such was the intention of Congress.

(b) That the President had the right, notwithstanding any intent of Congress, to enlarge and extend the boundaries of this reservation.

(c) That the President has the power to create a reserve on his own initiative and to segregate for the public use any of the public domain.

(d) That he has the right to create a reserve embracing portions of the public waters of the

United States for public use including the navigable waters of the United States and to prevent navigation and fishing thereon and therein, and that this reservation of the waters surrounding this reserve for a distance of three thousand feet from the line of mean low tide is valid, and that the appellants were trespassers thereon and that they intruded thereon in defiance of the proclamation of the President.

Appellee Entitled to Equitable Relief.

"The right of the Government to maintain a bill of equity on the ground of obligation or duty either to an individual or to the public when it had no pecuniary interest, is affirmed in several instances by the Supreme Court:

United States vs. *S. J. Tin Co.,* 125 U. S. 273;

United States vs. *Beebe,* 127 U. S. 338;

United States vs. *Marshall,* 129 U. S. 579;

United States vs. *World's Exposition,* 56 Fed. 630;

Cartner vs. *United States,* 129 U. S. 662.

The Court below in its opinion, adverting to another ground for relief in the bill of appellee (complainant below), to the effect that this structure,

the fish trap of the appellant, was constructed contrary to the provisions of the Rivers and Harbors bill of March 3, 1899, uses this language:

> "Plaintiff also bases the right of an injunction on the allegations in the complaint and the proof offered in support thereof, that the defendant's structures are a hindrance to navigation and are in violation of the provisions of the Rivers and Harbors Act of 1899; so far as this contention is concerned, I am constrained to hold that the defendants—I do not think that the structures are a hindrance to navigation."

We differ from the learned Judge of the Court below, as to the construction of this statute. The contention of the appellee (complainant below) was that the Rivers and Harbors Act of March 3, 1899, makes it unlawful absolutely for any person to build or commence to build any wharf, pier, weir (fish trap) or other structure in any water of the United States except inside of established harbor lines unless "on plans recommended by the Chief of Engineers and authorized by the Secretary of War." And the contention of the appellee below was that this structure was constructed in violation of that statute; that the Act made it absolutely unlawful to build any of the prohibited structures in any of the waters over which the United States has jurisdiction, except after complying with the provisions of that Act; and we still so contend.

We respectfully submit that the judgment of the Court below should be sustained.

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